Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

WILLIAM J. HAAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER A CRIMINAL PLEA BARGAIN WHICH CONTAINS A WAIVER OF APPELLATE RIGHTS AS TO SENTENCE FAILS TO EFFECTUATE AND INDEED FRUSTRATES THE PRIMARY GOAL OF THE FEDERAL SENTENCING GUIDELINES WHICH IS TO ELIMINATE SENTENCING DISPARITY.

WHETHER IT WAS ERROR FOR THE TRIAL COURT TO FAIL TO MAKE THE REQUIRED FINDING THAT THE PLEA BARGAIN AGREEMENT, INCLUDING THE WAIVER OF APPELLANT RIGHTS, PROMOTED AND EFFECTUATED THE FEDERAL SENTENCING GUIDELINES.

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PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit in *U.S. v. Haas,* No. 94-50232 was entered without Opinion on January 19, 1995 and this order is reproduced herein as Appendix Item 1. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in *U.S. v. Haas,* 94-50232 was entered on December 8, 1994; and is reproduced herein as Appendix Item 2.

JURISDICTION

The Petitioner's Motion for Rehearing to the United States Court of Appeals was timely filed pursuant to an order granting an extension of time, and was subsequently denied on January 19, 1995. This Petition was timely filed within ninety (90) days of that date pursuant to United States Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3742 provides in pertinent part that:

§ 3742. Review of a sentence.

(a) Appeal by a defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guidelines range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government. – The government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable. The government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

* * *

(d) Record on review. – If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals –

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration. – Upon review of the record, the court of appeal shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for –

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3552(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and Disposition. – If the court of appeals determines that the sentence –

(1) was imposed in violation of law or imposed as a result of an incorrect application of

the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

18 U.S.C.

Federal Sentencing Guidelines, in pertinent part states:

Policy statement governing the acceptance of plea agreements under Rule 11(e)(1), Fed. R. Crim.P., are intended to ensure that plea negotiation practices:

(1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and

(2) do not perpetuate unwarranted sentencing disparity.

These policy statements are a first step toward implementing 28 U.S.C. § 994(a)(2)(E). Congress indicated that it expects judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S.Rep. 98-225, 98th Cong., 1st Sess. 63, 167 (1983).

***Federal Sentencing Guidelines*, "Introductory Commentary," § 6B1.1 (West 1994-95 Ed.) at p. 320.**

STATEMENT OF THE CASE

The Petitioner, William J. Haas, was charged by information with bank fraud (18 U.S.C. 1344) in the United States District Court for the Western District of Texas, Pecos Division, RI Docket Sheet. The Petitioner entered into a plea agreement with the United States which read in pertinent part that:

> 11. I understand that the United States Attorney will make recommendation for a two points reduction for acceptance of responsibility; that the government will recommend sentencing at the lower end of the guidelines; and that the government will waive all rights to appeal issues relating to the sentencing guidelines.
>
> 12. Defendant, WILLIAM J. HAAS, is aware that his sentence will be imposed in conformity with the *Federal Sentencing Guidelines and Policy Statements.* The defendant WILLIAM J. HAAS also aware that sentence imposed under the Guidelines does not provide for parole. Knowing these facts, defendant agrees that this Court has jurisdiction and authority to impose any

> sentence within the statutory minimum set for his offense, including a sentence determined by reference to the Guidelines, and he expressly waives the right to appeal his sentence, including, any appeal right conferred by 18 U.S.C. § 3742, unless the judge makes a substantial departure upwards from the sentencing Guidelines. Similarly, the defendant agrees not to contest his sentence or the manner in which it was determined in any post-conviction proceeding, including, but not limited to, a proceeding under 28 U.S.C. § 2255.
>
> * * *
>
> Realizing the uncertainty in estimating what sentence he will ultimately receive, the defendant knowingly waives his right to appeal the sentence unless a substantial upward departure occurs or to contest it in any post-conviction proceeding in exchange for the concessions made by the government in the agreement.
>
> ***Plea Agreement,***
>
> **R I 27-32**

At the plea hearing held on February 9, 1994, the prosecutor generally mentioned the waiver of appellate rights, but the court did not specifically admonish the Petitioner on his right to appeal, etc.:

> [MR. BEERY, PROSECUTOR]: The plea bargain states, in summary, that there will be no other federal charges against Mr. Haas growing out of his association with Haas Motor Company, Incorporated of Alpine, Texas, in exchange for this plea of guilty to this one count. The government recommends 2 points for acceptance of responsibility. There will be no appeal by the

> Government, the Government waives all rights to appeal. There will be no appeal by the Defendant unless the Court departs substantially upwards from the guidelines in the sentence. I believe that is primarily the gist of that.
>
> [MR. HERSHBERGER, COUNSEL FOR DEFENDANT]: Yes, Your Honor.
>
> [DEFENDANT]: Yes, Your Honor.
>
> [THE COURT]: Is that your understanding of it, Mr. Hershberger?
>
> [MR. HERSHBERGER]: Yes, sir.
>
> [THE COURT]: Yours also, Mr. Haas?
>
> [THE DEFENDANT]: Yes, sir.
>
> **R II at p. 9**

ON April 4, 1994, the District Court conducted a sentencing hearing and concluded by advising the Petitioner as follows:

> [THE COURT]: You have the right to appeal. Notice in writing must be given within ten days under Federal Rules of Appellate Procedure 4(b). It may be that you are entitled to appeal in forma pauperis under Federal Rules of Appellate Procedure 24(a). In the event you wish to appeal you must indicate immediately what part of the record you need for appeal under Federal Rules of Appellate Procedure 10(b) and make arrangements with the court reporter.
>
> **R II at p. 30**

The Government did not object to this recital, R II 30 et seq. The docket sheet reflects that the Petitioner subsequently filed a notice of appeal and was granted an appellate bond by the court, R I, *Docket Sheet*, at p. 5.

The Petitioner filed an *Appellant's Brief* in the United States Court of Appeals for the Fifth Circuit on the 3rd of August, 1994, which alleged the following errors:

> *Point of error No. 1:* The District Court was clearly erroneous in calculating a loss at $120,325.
>
> *Point of Error No. 2:* The District Court clearly erred in finding more than one victim under sec. 2F1.1(b)(2)(B).
>
> ***Appellants' Brief*, at p. 4**

The United States replied without raising the waiver issue, *Government's Brief*, at p. 1 et seq. However the Government (at the panel's suggestion) did raise the issue in a supplementary brief. Subsequent to receiving the Government's supplementary brief, the panel summarily dismissed the Petitioner's appeal, holding:

> The Government argues in its supplemental brief that William J. Haas has waived his right to appeal. A defendant may waive his right to appeal if his waiver is knowing and voluntary. *United States v. Melancon*, 972 F.2d 566, 567-68 (5th Cir. 1992). As part of his plea agreement, Haas expressly waived his right to appeal his sentence, unless the judge made a substantial departure upwards from the Sentencing Guidelines. Haas acknowledged during his rearraignment that he had given up his right to appeal except in the case of an upward departure.

> Because Haas has waived his right to appeal, his appeal is DISMISSED.
>
> *U.S. v. Haas,* **94-50232**
>
> **Slip Opinion (5th Cir. 1994) at pp. 1-2**

The Petitioner with new counsel moved to reinstate the appeal or rehearing while asserting the following points:

> I. **THE TRIAL COURT DID NOT FIND THAT THE PLEA BARGAIN AND ESPECIALLY ITS WAIVER OF APPEAL SECTION PROMOTED AND EFFECTUATED THE POLICIES OF THE FEDERAL SENTENCING GUIDELINES.**
>
> II. **THE TRIAL COURT DID NOT EXAMINE THE PLEA BARGAIN AND ITS WAIVER RIGHTS OF APPEAL TO DETERMINE WHETHER PROSECUTORS HAVE UNDERMINED THE SENTENCING GUIDELINES.**
>
> III. **A PLEA BARGAIN WHICH CONTAINS A WAIVER OF APPEAL OF SENTENCE DOES NOT EFFECTUATE AND INDEED FRUSTRATES THE PRIMARY GOAL OF THE FEDERAL SENTENCING GUIDELINES WHICH IS TO ELIMINATE SENTENCING DISPARITIES AND THUS IS VOID OR VOIDABLE.**
>
> IV. **THE DISTRICT COURT DID NOT ADEQUATELY ADMONISH THE DEFENDANT REGARDING HIS RIGHTS TO APPEAL SO AS TO MAKE THE DEFENDANT'S WAIVER KNOWING AND VOLUNTARY.**
>
> *Appellant's Petition for Rehearing,* **at p. 2.**

However, the United States Court of Appeals for the Fifth Circuit denied this Motion on January 19, 1995, thus necessitating the filing of this Petition for Writ of Certiorari to this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

WHETHER A CRIMINAL PLEA BARGAIN WHICH CONTAINS A WAIVER OF APPELLATE RIGHTS AS TO SENTENCE FAILS TO EFFECTUATE AND INDEED FRUSTRATES THE PRIMARY GOAL OF THE FEDERAL SENTENCING GUIDELINES WHICH IS TO ELIMINATE SENTENCING DISPARITY.

II.

WHETHER IT WAS ERROR FOR THE TRIAL COURT TO FAIL TO MAKE THE REQUIRED FINDING THAT THE PLEA BARGAIN AGREEMENT, INCLUDING THE WAIVER OF APPELLANT RIGHTS, PROMOTED AND EFFECTUATED THE FEDERAL SENTENCING GUIDELINES.

A. Specific Reasons For Granting The Writ.

The Petitioner asserts that waivers of rights to appeal sentences by defendants (and/or the Government) should not be permitted as a matter of law because appellate review is a necessary and integral part of the Federal Sentencing Guidelines, and because the elimination of appellate review could only have the effect of allowing the very disparity of sentences which the Federal Sentencing Guidelines were formulated to eliminate in the first place. This is a rare case where the rights of the

individual and the Government to waive their rights must give way to the needs of the entire federal criminal justice system in seeing that the Federal Sentencing Guidelines both operates efficiently and achieves its purpose in eliminating sentencing disparity.

This notion that the parties may not subvert the purposes of the Federal Sentencing Guidelines even by agreement is explicitly set out in the *Federal Sentencing Guidelines* themselves:

> *Policy statement governing the acceptance of plea agreements under Rule 11 (e)(1), Fed. R. Crim.P., are intended to ensure that plea negotiation practices:*
>
> *(1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and*
>
> *(2) do not perpetuate unwarranted sentencing disparity.*
>
> *These policy statements are a first step toward implementing 28 U.S.C. § 994(a)(2)(E). Congress indicated that it expects judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S.Rep. 98-225, 98th Cong., 1st Sess. 63, 167 (1983).*
>
> ***Federal Sentencing Guidelines,* "Introductory Commentary," § 6B1.1 (West 1994-95 Ed.) at p. 320.**

Here, the District Court did not make a finding or even consider whether the prosecutor was undermining the *Federal Sentencing Guidelines* through the Appellate waiver clauses of the plea agreement. The Petitioner would argue that these waivers of right to appeal by the

Defendant and by the Government threatened to undermine the hard-won sentencing uniformity established by the *Guidelines* and for this reason alone deserves prompt and close attention by this Court under its Certiorari Jurisdiction.

B. Argument

1. Current Authority

Virtually every Circuit has approved and enforced these waivers of appeal, see *U.S. v. Melancon*, 972 F.2d 566, 567 (5th Cir. 192); *U.S. v. Guevara*, 949 F.2d 706, 707-08 (4th Cir. 1991); *U.S. v. Rutan*, 956 F.2d 827, (8th Cir. 1992); *U.S. v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991); *U.S. v. Salcido-Contreras*, 990 F.2d 51, 51-52 (2d Cir. 1993); *U.S. v. Bushert*, 997 F.2d 1343, 1347-50 (9th Cir. 1993). However, there has been little discussion by trial courts or appellate courts as to the probable effects of such waivers on the purposes and operation of the *Guidelines* except in dissent, see *Bolinger*, 940 F.2d at 481, J. Nelson, dissenting in part; *Melancon*, 972 F.2d at 570, J. Parker, concurring specially. For example, Judge Parker in concurrence wrote:

> I concur specially because I cannot dissent. This panel is bound by the unpublished, per curiam opinion, *United State v. Sierra*, No. 91-4342 (5th Cir. Dec. 6, 1991) [951 F.2d 345 (Table)].
>
> * * *
>
> In brief: every erroneous application of the Guidelines frustrates the complex policy goals that Congress and the United States Sentencing

> Commission intended for the Guidelines to further. The *Sierra* rule works a breach of the Judiciary's duty to ensure that the goals for Congress and the Sentencing commission are met. *Cf. Mistretta v. United States*, 488 U.S. 361, 390, 109 S.Ct. 647, 664, 102 L.Ed.2d 714 (1989) ("the sentencing function long has been a peculiarly shared responsibility among the Branches of government and has never been thought of as the exclusive constitutional province of any one Branch.") (citing *United States v. Addonizio*, 442 U.S. 178, 188-189, 99 S.Ct. 2235, 2242, 60 L.Ed.2d 805 (1979)). And the fact that – as my colleagues emphasize – "the district court ultimately imposed a sentence within the [applicable guideline] range" affords no systemic shelter from *Sierra's* certain storm of judicial encroachment. [footnotes omitted]
>
> ***U.S. v. Melancon,***
> **972 F.2d 566, 570, 575 (5th Cir. 1992)**

And Judge Nelson dissenting, made the same point:

> As a prime aim of the Guidelines is to promote uniformity, even in plea agreements, see U.S.S.G. Ch. 6, Pt. B, intro. comment. ("Policy statements governing the acceptance of plea agreements . . . are intended to ensure that plea negotiation practices . . . do not perpetuate unwarranted sentencing disparity."), I do not believe we can grant district courts carte blanche so long as they remain under the cap of the plea agreement. The Guidelines must be followed, whether in the context of a plea agreement or not.

* * *

> Furthermore, policy reasons do not dictate the enforcement of the waiver in this case. According to *Navarro-Botello:* "[P]lea bargaining saves the state time and money," and it also promotes finality. *Id.* at 322. While certainly true, these arguments refer far more to the appeal of convictions than sentences. Permitting an appeal of sentence neither deters effective plea bargaining, since appellant is asking only that the court follow the agreement, nor disputes the finality of factual guilt. While great resources both temporal and financial may well be consumed in providing a new trial, considerably less is required for new sentencing.
>
> * * *
>
> At bottom, a salient purpose of the Guidelines is to reduce sentencing disparity and to create uniformity. *See* U.S.S.G.Ch. 1, Pt. A(3). thus, when an appeal asserts that the district court did not follow the plea agreement because it misapplied the Guidelines, such appeal should not be barred by waiver.
>
> ***U.S. v. Bolinger,***
> **940 F.2d 478, 482-83 (9th Cir. 1991)**

Indeed, all of the decisions which validate these waivers are based on rather narrow contract or waiver principles examined in a vacuum. These decisions simply do not handle the problem that plea agreements ***must*** facilitate and not impair the purposes of the *Guidelines* ***irregardless*** of whether they are valid, knowing contracts or waivers. As the introductory commentary notes:

> *Policy statement governing the acceptance of plea agreements under Rule 11(e)(1), Fed. R. Crim.P., are intended to ensure that plea negotiation practices:*

> *(1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and*
>
> *(2) do not perpetuate unwarranted sentencing disparity.*
>
> *These policy statements are a first step toward implementing 28 U.S.C. § 994(a)(2)(E). Congress indicated that it expects judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S.Rep. 98-225, 98th Cong., 1st Sess. 63, 167 (1983).*
>
> ***Federal Sentencing Guidelines,* "Introductory Commentary," § 6B1.1. (West 1994-95 Ed.) at p. 320.**

None of these judges writing these opinions have done that. On the other hand, those judges writing in dissent have uniformly come to the conclusion that a presentence waiver of appeal is deleterious *per se* to the primary goal of the *Guidelines*, uniformity of sentence. This conclusion is logical and inescapable.

The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988) and 28 U.S.C. §§ 991-998 (1988) fundamentally changed the sentencing of criminal defendants in Federal Courts. Prior law employed an indeterminate sentencing system: statutes established statutory limits for different offenses, but delegated broad discretion to the judge in setting an appropriate sentence in a specific case. The Parole Commission then fixed the actual period of imprisonment by deciding when and if the defendant would be released on parole. This sentencing system was especially criticized

for creating unwarranted disparity in the sentences imposed on similarly situated defendants and uncertainty in the length of time that defendants serve in prison. In the Sentencing Reform Act, Congress moved to correct these problems by eliminating the parole system and creating a more determinate sentencing method, in which the sentence imposed by a judge represents the actual period that a defendant will spend in prison, minus "good time." *See* S. Rep. No. 225, *supra* note 1. at 39-49, *reprinted in* 1984 U.S.C.C.A.N. at 3222-31.

In addition the Sentencing Reform Act of 1984, 18 U.S.C. § 3742 (1988), Pub. L. No. 98-473, 98 Stat. 1987 (1984) virtually eliminated District Court review of sentences through former F.R.Cr.P. Rule 35 and substituted appellate review by the Courts of Appeal, see 18 U.S.C. 3742 (1983), S. Rep. No. 225, 98th Cong. 2d Sess., Reprinted in 1984 U.S.C.C.A.N. at 3337. In this regard, the Senate Judiciary Committee explained that Government Appeals of sentences, heretofore virtually prohibited, were necessary to reduce unwarranted sentencing disparity. S. Rep. No. 225, *supra*, note 1 at 151. And this very Court in *Mistretta v. U.S.*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) recognized that appellate review was a basic and central mechanism of the act:

> The act, as adopted, revises the old sentencing in several ways:
>
> * * *
>
> 5. It authorizes limited appellate review of the sentence. It permits a defendant to appeal a sentence that is above the defined range, and it permits the Government to appeal a sentence that is below that range. It also permits either

> side to appeal an incorrect application of the guideline. §§ 3742(a) and (b).
>
> ***Mistretta*, 488 U.S. at 366**

And the goals of this mechanism were clearly set forth:

> To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing.
>
> * * *
>
> Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.
>
> ***Federal Sentencing Guidelines*, "The Basic Approach" (Policy Statement), CH1, Pt A, At p. 2**

If we review the law and legislative history we can only come to one conclusion. Let us consider them. *First*, we find that preventing disparity is one of the three goals of the Federal Sentencing Guideline,[1] see *"Basic Approach"*

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[1] The third goal of uncertainty of sentence is surely implicated here as well. If a judge could erroneously apply a

(Policy Statement), *Federal Sentencing Guidelines, supra. Second,* we find that legislative intent indicates that Government appeals were thought to be *necessary* to prevent disparity from too lenient sentences, S. Rep. 225, *supra.* Conversely, appeals by defendants would logically have to be equally *necessary* to prevent disparity through sentences which were too severe. *Third,* the *Federal Sentencing Guidelines* prohibits plea agreements which run counter to the *Guidelines* goals, and enjoins judges to "examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S.Rep. 98-225, 98th Cong., 1st Sess. 63, 167 (1983). *Fourth,* 18 U.S.C. 3742 does not provide for waivers. Adding all of these factors together, how can appeal of sentence waivers be lawful? How can they be consistent will the goals of the *Guidelines*?

And this is completely aside from the spectre of individuals serving illegal sentences without remedy and what damage this will do to our Criminal Justice System. Today, even errors acknowledged by the Government can result in defendants serving illegal sentences, see *United States v. Kuhl,* 816 F. Supp. 623 (D.C. Cal. 1993). When we look beyond these reported cases to the 40,000 plus federal convictions per year, see *Mistretta,* 488 U.S. at 369, and realize that most of these convictions are obtained pursuant to plea bargains and that the use of the appeal waiver is proliferating, we see a compelling case

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guideline ten levels too high without the correction of appeal, one might just have a little uncertainty at sentencing to say the least.

for this Court to exercise its jurisdiction through a Writ of Certiorari.

CONCLUSION AND PRAYER

The Petitioner earnestly asks this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the grounds that this is a troublesome issue involved in numerous cases pending before the Federal Courts thereby deserving of an early and definitive resolution by this Court. Petitioner would also point out a need for this Court to act because a virtual host of District Judges and all of the Circuit Judges writing majority opinions on this issue have steadfastly failed to do as the *Guidelines* have mandated; they have failed to evaluate the effect of plea bargain appeal waivers on the operation and purposes of *Guidelines* rather than merely considering their validity as contracts or waivers.

WHEREFORE THE ABOVE PREMISES CONSIDERED Petitioner respectfully prays that this Honorable Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit; thereafter remand this cause to the United States District Court of Appeals for the Fifth Circuit with instructions to reverse his conviction.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50232
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM J. HAAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. P-94-CR-07

(Filed Dec. 9, 1994)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The Government argues in its supplemental brief that William J. Haas has waived his right to appeal. A defendant may waive his right to appeal if his waiver is knowing and voluntary. *United States v. Melancon*, 972 F.2d 566, 567-68 (5th Cir. 1992). As part of his plea agreement, Haas expressly waived his right to appeal his sentence, unless the judge made a substantial departure upwards from the Sentencing Guidelines. Haas acknowledged during his rearraignment that he had given up his right to appeal except in the case of an upward departure. Because Haas has waived his right to appeal, his appeal is DISMISSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50232

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM J. HAAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(January 19, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge